

Supreme Court, U.S.  
FILED  
JUL 28 1994  
OFFICE OF THE CLERK

No. 94-3

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

---

**REYNOLDSVILLE CASKET CO., et al.,**  
*Petitioners,*

v.

**CAROL L. HYDE,**  
*Respondent.*

---

**On Petition for a Writ of Certiorari to the**  
**Supreme Court of Ohio**

---

**BRIEF IN OPPOSITION**

---

DAVID J. EARDLEY  
Counsel of Record  
114 East Park Street  
Chardon, Ohio 44024  
(216) 286-6177  
*Counsel for Respondent,*  
*Carol L. Hyde*

---

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp  
**BEST AVAILABLE COPY**

## **QUESTION PRESENTED FOR REVIEW**

Whether state courts may fashion a remedy which provides for access to their courts when a decision of the U.S. Supreme Court is retroactively applied to divest litigants of an accrued right guaranteed them by the state constitution.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW .....	i
TABLE OF AUTHORITIES .....	iv
REASONS FOR DENYING THE WRIT .....	1
I. THIS CASE IS NOT OF GENERAL INTEREST, DOES NOT INVOLVE AN UNSETLED QUESTION OF FEDERAL CONSTITUTIONAL OR STATUTORY LAW, AND DOES NOT INVOLVE A DECISION WHICH CONFLICTS WITH GOVERNING SUPREME COURT PRECEDENT .....	1
II. THE JUDGMENT OF THE OHIO SUPREME COURT RESTS UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND WHICH PRECLUDES REVIEW IN THIS COURT .....	4
III. THE OHIO SUPREME COURT CORRECTLY TAILORED ITS REMEDY TO THE RETROACTIVE APPLICATION OF THE <i>BENDIX</i> DECISION CONSISTENT WITH THE MANDATES OF THE OHIO CONSTITUTION .....	6
CONCLUSION .....	9

## TABLE OF AUTHORITIES

## CASES:

	Page
<i>Adams v. Sherk</i> , 32 Ohio St. 2d 61, 446 N.E. 2d 165 (1983) .....	6
<i>James Beam Distilling Company v. Georgia</i> , 501 U.S. —, 115 L.Ed. 2d 481, 111 S.Ct. 2439 (1991) .....	8
<i>Bendix Autolite Corp. v. Midwesco Enterprises, Inc.</i> , 486 U.S. 888, 100 L.Ed. 896, 108 S.Ct. 2218 (1988) .....	<i>passim</i>
<i>Chevron Oil Company v. Huson</i> , 404 U.S. 97, 30 L.Ed. 2d 296, 92 S.Ct. 349 (1971) .....	7, 8
<i>Cook v. Matvejs</i> , 56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978) .....	6
<i>Enterprise Irrigation District v. Farmer's Mutual Canal Company</i> , 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1917) .....	5
<i>Fletcher v. Weir</i> , 455 U.S. 603, 71 L.Ed. 2d 490, 102 S.Ct. 1309 (1982) .....	9
<i>Fox Film Corp. v. Muller</i> , 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935) .....	5
<i>Griffith v. Kentucky</i> , 479 U.S. 314, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987) .....	3
<i>Harper v. Virginia Department of Taxation</i> , 509 U.S. —, 125 L.Ed. 2d 74, 113 S.Ct. 2510 (1993) .....	<i>passim</i>
<i>Herb v. Pitcairn</i> , 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945) .....	5
<i>Honeyman v. Hanan</i> , 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1937) .....	5
<i>Hyde v. Reynoldsville Casket Company</i> , (1994) 68 Ohio St. 3d 240, 626 N.E. 2d 75 .....	<i>passim</i>
<i>Jankovich v. Indiana Toll Road Commission</i> , 379 487, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965) .....	5
<i>Kintz v. Harringer</i> , (1919) 99 Ohio St. 240, 124 N.E. 168 .....	4
<i>Mental Hygiene Department v. Kirchner</i> , 380 U.S. 194, 13 L.Ed. 2d 753, 85 S.Ct. 871 (1965) .....	5
<i>Peerless Electric Company v. Bowers</i> , 164 Ohio St. 209, 129 N.E. 2d 467 (1955) .....	6

## TABLE OF AUTHORITIES—Continued

	Page
<i>Provident Inst. v. Massachusetts</i> , (1868) 6 Wall. 611, 18 L.Ed. 907 .....	9
<b>CONSTITUTION:</b>	
<i>Ohio Constitution, Article I, § 16</i> .....	4, 5, 6, 7

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

---

No. 94-3

---

REYNOLDSVILLE CASKET CO., *et al.*,  
*Petitioners*,  
v.

CAROL L. HYDE,  
*Respondent*.

---

On Petition for a Writ of Certiorari to the  
Supreme Court of Ohio

---

**BRIEF IN OPPOSITION**

---

**REASONS FOR DENYING THE WRIT**

- I. THIS CASE IS NOT OF GENERAL INTEREST, DOES NOT INVOLVE AN UNSETTLED QUESTION OF FEDERAL CONSTITUTIONAL OR STATUTORY LAW, AND DOES NOT INVOLVE A DECISION WHICH CONFLICTS WITH GOVERNING SUPREME COURT PRECEDENT.

In 1988, this Court held that an Ohio statute which tolled the limitations period for filing civil lawsuits was unconstitutional. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 100 L.Ed. 2d 896, 108 S.Ct. 2218 (1988). The Ohio Supreme Court in *Hyde v. Reynoldsville Casket Company* (1994), 68 Ohio St. 3d 240, 626 N.E. 2d 75 retroactively applied that de-

cision, but following *Harper v. Virginia Department of Taxation*, 509 U.S. —, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993), fashioned a remedy for Ohio litigants who would otherwise be deprived of their vested rights guaranteed under the Ohio Constitution. The state court interpreted the clause of the Ohio Constitution that provided a right to a remedy in Ohio courts to require the Ohio Supreme Court to fashion a remedy for litigants who would otherwise be barred from suits as a result of the retroactive application of *Bendix*. In *Harper*, this Court recognized that state courts may fashion remedies to protect the rights of parties affected by the retroactive application of decisions of this Court.

This case does not merit full review by this Court, as it affects only a small number of Ohio litigants,<sup>1</sup> and is not of general interest to the citizens of the United States.

The *Hyde* case commenced with the timely filing of a Complaint in state court for personal injuries. The Plaintiff, Ms. Hyde, had taken advantage of an Ohio statute that tolled the limitations period for claims against out of state corporations. Subsequent to the timely filing of

<sup>1</sup> Except for Respondent herein, only a few other Ohio residents are affected by *Hyde, supra*. Each of these other Ohio residents claim injury from their use of the Dalkon Shield IUD, and each of them had claims filed in court prior to *Bendix, supra*. None of them has been permitted to proceed to litigation—all lawsuits (and statutes of limitation) were tolled when the manufacturer of the Dalkon Shield IUD, the A.H. Robbins Company, filed a petition in bankruptcy on August 21, 1985, in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond division.

The Ohio Dalkon Shield victims will soon be emerging from bankruptcy, and *Hyde* preserves their vested right to continue the pursuit of their claims in court. If the Ohio Supreme Court in *Hyde* had applied *Bendix* retroactively without benefit of the remedy mandated by *Harper, supra*, then some of the Ohio Dalkon Shield victims would have emerged from bankruptcy to find their vested, tolled and timely filed causes of action had been extinguished in contravention of the mandates of the Ohio Constitution's "right to a remedy" clause.

her claim, this Court held the statute upon which she relied unconstitutional. See, *Bendix, supra*. Thereafter, her case was dismissed on the authority of *Bendix*. In *Hyde, supra*, the Ohio Supreme Court reversed, holding that the retroactive application of *Bendix* did not mandate that she be deprived of her day in court under the circumstances.

The Ohio tolling provision, as it purports to apply to out of state corporations, is now known to be unconstitutional, and has been so since 1988, when this Court decided *Bendix*. Accordingly, the *Hyde* ruling will affect only the rights of litigants whose actions have been pending since that time: the parties herein, and the few Dalkon Shield victims whose claims have accrued, but who have not yet fully asserted their rights. Petitioners therefore seek to have this Court review a case which will affect only a very small number of persons in a very limited set of circumstances and which will not result in a general rule of federal constitutional, statutory, or decisional law.

Furthermore, the case *sub judice* does not involve any unsettled question of federal constitutional law. This Court's retroactivity doctrine was recently set forth in *Harper, supra*, and *Griffith v. Kentucky*, 479 U.S. 314, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987), which held that if this Court applies a rule to the parties before it, then the rule will be retroactive to all pending cases, subject to the state court's right to fashion a remedy once retroactive application has occurred. *Harper, supra* at 86, 89.

Here, Petitioners do not seek clarification of this Court's retroactivity doctrine, but instead seek to have this Court correct what they view as an erroneous decision by the Ohio Supreme Court. In their Petition, they merely rehash the arguments that they made before the Ohio court. The Ohio Court's decision, however, does not involve a constitutional question which requires this Court's attention. The Petition fails to demonstrate the existence of

either an unsettled question of federal constitutional law, or an unsettled question of federal statutory law.

Furthermore, as the Ohio Supreme Court followed this Court's mandate in *Harper, supra*, by retroactively applying *Bendix* but fashioning a remedy consistent with the state constitutional mandate, its decision does not conflict with the governing precedent set by this Court. Therefore, no conflict exists between the Ohio Court's decision and the mandate established by this Court. Consequently, the Petition for Certiorari should be denied.

## **II. THE JUDGMENT OF THE OHIO SUPREME COURT RESTS UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND WHICH PRECLUDES REVIEW IN THIS COURT.**

The Ohio Supreme Court rested its decision upon § 16, Article I of the Ohio Constitution. Article I, § 16 provides:

“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay.”

Article I, § 16 is unique to Ohio law, in that it is a constitutional provision which provides a “right to a remedy” in the courts of Ohio. The citizens of Ohio placed this protection into the Bill of Rights of the 1851 Ohio Constitution.

The right to a remedy under the Ohio Constitution is one which has consistently been protected by the Ohio Supreme Court. The Ohio Supreme Court has mandated that once a right exists, the court is bound by this constitutional provision to provide a remedy. *Kintz v. Harringer* (1919), 99 Ohio St. 240, 124 N.E. 168. Because the retroactive application of *Bendix* deprived litigants of their rights, the Ohio Supreme Court fashioned a remedy for those litigants as permitted by *Harper*.

In doing so, the Ohio Supreme Court grounded its decision in part upon its interpretation of the Ohio Constitution explaining:

“Our decision today does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows § 16, Article I of the Ohio Constitution and the commerce clause of the Federal Constitution to coexist.”

This Court has consistently declined to review the judgment of a state court that rests upon an adequate and independent ground in state law. *Herb v. Pitcairn*, 324 U.S. 117, 128, 89 L.Ed. 789, 65 S.Ct. 459 (1945). Accord, *Honeyman v. Hanan*, 300 U.S. 14, 18-19, 81 L.Ed. 476, 57 S.Ct. 350 (1937); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935).

The jurisdiction of this Court to review a decision of a state supreme court arises only in those instances where the federal ground was the sole basis for the decision, or where the state constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. *Mental Hygiene Department v. Kirchner*, 380 U.S. 194, 198, 13 L.Ed. 2d 753, 85 S.Ct. 871 (1965). Where the non-federal ground for judgment is independent of the other ground; and broad enough to sustain the judgment, then this court will not disturb the State judgment. *Enterprise Irrigation District v. Farmer's Mutual Canal Company*, 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1917). Equal reliance upon federal and state substantive grounds has been held sufficient to preclude Supreme Court review. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965).

Here, the judgment of the Ohio Supreme Court rests upon an interpretation and application of its state constitutional provision for redress in its courts. The Ohio Constitution provides a right to a remedy to those individuals who have acquired a vested right under the

state of the law at the time their action was filed. Vested rights accrue when a litigant relies upon a statute of limitations during the time period when the complaint is filed. *Adams v. Sherk*, 32 Ohio St. 2d 61, 446 N.E. 2d 165 (1983). Therefore, under Ohio constitutional law, decisions of the Ohio Supreme Court may not be retroactively applied to divest parties of rights vested under the prior law. *Peerless Electric Company v. Bowers*, 164 Ohio St. 209, 129 N.E. 2d 467 (1955).

The application of Ohio's Constitution by the Ohio Supreme Court is clearly an adequate and independent ground for relief in this matter. The Ohio Supreme Court correctly held that Respondent had filed her claims in reliance upon the state of the law prior to the *Bendix* decision. Respondent's justifiable reliance upon the existing law vested within her the constitutional civil rights provided to her by Article I, § 16 of the Ohio Constitution. That civil right cannot be taken away by a retroactive application of law.<sup>2</sup>

In applying and interpreting § 16, Article I of the Ohio Constitution, the Ohio Supreme Court has rested its decision upon an adequate and independent state ground for relief. That independent ground precludes this Court from review of that decision.

### **III. THE OHIO SUPREME COURT CORRECTLY TAILORED ITS REMEDY TO THE RETROACTIVE APPLICATION OF THE *BENDIX* DECISION CONSISTENT WITH THE MANDATES OF THE OHIO CONSTITUTION.**

As this Court has recognized, where a decision is retroactively applied, state courts are left with the obligation to provide relief consistent with federal due process prin-

<sup>2</sup> The Ohio Supreme Court has held that the retroactive application of a legislative amendment to a statute of limitations period which results in the total obliteration of an individual's existing substantive rights will be prohibited. *Cook v. Matvejs*, 56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978).

ciples. 125 L.Ed. 2d at 88. As the majority explained in *Harper*:

"Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.* at 51-52, 110 L.Ed. 2d 17, 110 S.Ct. 2238. State law may provide relief beyond the demands of federal due process, *id.* at 52, n. 36, 110 L.Ed. 2d 17, 110 S.Ct. 2238, but under no circumstances may it confine petitioners to a lesser remedy, see, *id.*, at 44-51, 110 L.Ed. 2d 17, 110 S.Ct. 2238."

125 L.Ed. 2d at 89.

Although the Ohio Supreme Court in *Hyde*, *supra*, initially reviewed and applied *Chevron Oil Company v. Huson*, 404 U.S. 97, 30 L.Ed. 2d 296, 92 S.Ct. 349 (1971), the Court recognized that it was constrained to apply *Harper* in its analysis.<sup>3</sup> The Ohio court then applied *Harper*, and as *Harper* permits, fashioned the appropriate relief to be accorded to the citizens of Ohio. In so doing, the Ohio court harmonized the decision of *Bendix* with the requirements of the Ohio Constitution, § 16, Article I, explaining:

"Our decision today does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows § 16, Article I of the Ohio Constitution and the com-

---

<sup>3</sup> In reviewing *Chevron*, the court indicated that it was unclear whether *Harper* was intended to replace *Chevron* or to supplement it. *Hyde*, *supra*, at 243. The Ohio Supreme Court then applied *Chevron* because this Court left open the issue of retroactivity where the issue was reserved by the Court. *Harper*, *supra*, at 125 L.Ed. 2d at 86-87. The question of retroactivity was reserved in *Bendix*, *supra*, at 100 L.Ed. 2d at 905. Upon applying the *Chevron* factors, the Ohio Supreme Court found that prospective application of the *Bendix* decision was mandated.

merce clause of the Federal Constitution to coexist."

68 Ohio St. 3d 245.

In fashioning its remedy, the Ohio Supreme Court provided for the protection of individual rights as consistently mandated by the United States Supreme Court decisions in *Chevron Oil Company v. Huson*, *supra*, *Harper v. Virginia Department of Taxation*, *supra*, and *James Beam Distilling Company v. Georgia*, 501 U.S. —, 115 L.Ed. 2d 481, 111 S.Ct. 2439 (1991). This Court's decisions consistently provide that the doctrine of retroactivity may not be applied in such a way as to deprive litigants of their due process rights, as the principles of equality, fairness and *stare decisis* were furthered by the retroactive application of the decision in *James Beam*, *Chevron*, and *Harper*. In contrast, a retroactive application of the *Bendix* decision in this case that ignored the remedy directives of *Harper* would serve only to deprive Respondent of vested, accrued rights, and deprive her of the right to her day in court. The remedy fashioned by the Ohio court preserved the due process rights of the Respondent.

Thus, contrary to Petitioners' assertions, the Ohio Supreme Court *did* retroactively apply the *Bendix* decision, as required by *Harper*. The Court also fashioned a remedy pursuant to the state constitutional right to a remedy in compliance with *Harper*, thereby allowing both the constitutional right to a remedy and the commerce clause of the Federal Constitution to coexist.

The Ohio Supreme Court also noted the potential conflict between the state constitutional provision for a right to a remedy and this Court's rule of decision on retroactivity, noting:

"... when there is a conflict between a state constitutional civil right and federal rule of decision that is not rooted in the United States Constitution such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245. This Court has held that decisions not involving federal questions are not binding

upon state courts. *Provident Inst. v. Massachusetts* (1868), 6 Wall 611, 18 L.Ed. 907. Accordingly, states are free to follow or disregard principles which have evolved on the basis of decisional law not based upon any constitutional principle, so long as the state procedure remains consistent with due process of law. *Fletcher v. Weir*, 455 U.S. 603, 71 L.Ed. 2d 490, 102 S.Ct. 1309 (1982).

This Court's retroactivity doctrine is based upon the common law and federal rules of decision, but not the Constitution, as Justice Thomas, speaking on behalf of the majority, explained:

"Both common law and our own decisions have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.' " (Citations omitted.)

125 L.Ed. 2d at 84. Accordingly, as the Ohio Supreme Court recognized, litigants guaranteed a state constitutional right to a remedy should not be divested of that right due to a federal rule of decision not rooted in the United States Constitution.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID J. EARDLEY  
Counsel of Record  
114 East Park Street  
Chardon, Ohio 44024  
(216) 286-6177  
*Counsel for Respondent,*  
*Carol L. Hyde*